

UNITES STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 385165
Issued to: Daniel Jerome RICHARDS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2085

Daniel Jerome RICHARDS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 12 March 1976, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia admonished Appellant upon finding him guilty of negligence. The specification found proved alleges that while serving as Master on board the SS VANTAGE HORIZON under authority of the license above captioned, on or about 14 December 1975, Appellant, while navigating on Chesapeake Bay, during conditions of fog and restricted visibility did wrongfully fail to obtain or properly use information available to him from radar observations to determine the course and speed of another vessel detected in his vicinity. A second part of the specification found not proved and stricken from the specification prior to Appellant's case in chief was that the error contributed to a collision between his vessel and M/V DAEYANG PROSPERITY.

A second specification alleging that Appellant did wrongfully fail to navigate his vessel with caution was found not proved.

A third specification alleging that Appellant did wrongfully fail to navigate his vessel at a moderate speed was also found not proved.

At the hearing, Appellant was represented by counsel and entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced into evidence excerpts from the ship's log, other documents, and the testimony of the Third Mate, an able seaman, and the Third and First Assistant Engineers, all serving with Appellant on the SS VANTAGE HORIZON on or about 14 December 1975.

In defense, Appellant offered in evidence the expert testimony of Captain Harry A. Clark, and Martin E. Pecil, and certain documents.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charge and first specification as amended had been proved, admonishing Appellant. The Judge then served a written order on Appellant admonishing him.

The entire decision and order was served on 12 March 1976. Appeal was timely filed on 6 April 1976.

FINDINGS OF FACT

On 14 December 1975, Appellant was serving as Master on board the SS VANTAGE HORIZON and acting under authority of his license while the ship was at sea. The SS VANTAGE HORIZON is a 19,307 gross ton steel tanker 631.4 feet in length. She was equipped with properly operating radar, a radio detection finder, and two radios.

On Sunday, December 14, 1975, the VANTAGE HORIZON was outbound in Chesapeake Bay, having departed in Baltimore, Maryland, for Russia. Visibility was poor because of fog. At 1205 the vessel discharged her pilots, and Appellant was in control and standing radar watch. The visibility did not extend beyond the bow, which had a lookout.

The radar was operating properly and was used twice between 1205 and 1212 to determine the position of the vessel in relation to Buoy No. 2. After discharging the pilots, the vessel's course was maintained until it collided with the DAEYANG PROSPERITY.

At 1212, as the VANTAGE HORIZON departed Cape Henry, Appellant heard a radio conversation between the pilot boat HAMPTON ROADS and the DAEYANG PROSPERITY. The HAMPTON ROADS twice advised that the DAEYANG PROSPERITY was confusing the outbound VANTAGE HORIZON with the pilot boat.

At 1214 Appellant ordered slow ahead and by radio identified his vessel, stating she was outbound on the right side of the channel. Just before 1216 the bow lookout reported by phone a vessel dead ahead and Appellant immediately ordered emergency full astern. At 1218 the DAEYANG PROSPERITY was sighted from the VANTAGE HORIZON'S Bridge about 100-150 feet 3 points off the latter's bow. Appellant ordered stop at 1218 and then full astern at 1219. At 1220 the bow of the DAEYANG PROSPERITY struck the VANTAGE HORIZON forward on its port side.

The Appellant did not utilize the VANTAGE HORIZON'S radar to detect the presence and location of the DAEYANG PROSPERITY.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- (1) it was error for the Administrative Law Judge to amend the first specification eliminating certain language;
- (2) that no jurisdiction exists under 46 U.S.C. 239 for a charge of negligence which does

not contribute to a marine casualty; and

- (3) that there is no evidence in the record to support the finding that Appellant wrongfully failed to obtain, or properly use, information available to him from radar to determine the course and speed of another vessel.

APPEARANCE: Hugh S. Meredith, Esq., of Vandeventer, Black, Meredith and Martin, Norfolk, Virginia.

OPINION

I

After the close of the Government's case, Appellant moved to dismiss the charge and specifications. as to the first specification, the one at issue in this appeal, Appellant's counsel argued that there was no evidence that another vessel in the vicinity had been detected on the radar. The Judge stated that this wasn't the crux of the specification which was that Appellant did not use his radar properly to determine the presence of another vessel which was known to be in the vicinity. (R. 65-68). When the hearing was reconvened on March 3, 1976, the Judge dismissed the part of the specification alleging that Appellant's negligence contributed to the collision. (R 77). This was before Appellant put on his defense. Thus, it is undisputed that Appellant had notice of the charge against him prior to putting on his defense.

Appellant urges that it was error for the Administrative Law Judge to amend the specification where deletion of the language is essential to a specification of negligence. As will be discussed under Point II, a collision is not essential to the charge of negligence.

More important is whether Appellant had the proper notice of the charge against him and an opportunity to defend against that charge as required by Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir. 1550), and the long line of Commandant's Appeal Decisions following Kuhn. I find that Appellant had that notice, that there was no element of surprise when the Judge amended the specification to conform to the proof.

II

Appellant contends that negligence must contribute to the marine casualty for jurisdiction to exist under 46 U.S.C. 239(b). This is clearly not true. It has long been held that the criteria in these administrative hearings is negligence rather than fault contributing to a casualty. Appeal Decision No. 1353 (SMITH and MEGEE).

Appellant cites a case under review by the Commandant in support of his argument. Appeal Decision No. 2080 (FULTON) has been issued and reaffirms that negligence does not require fault contributing to a casualty. FULTON recognized as controlling 46 CFR 5.05-20(2) which defines

negligence as "the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform." In FULTON I found that the Government did not meet its burden of proving this. The dismissal was not dependent on the fact that there was no collision.

III

Appellant's third point on appeal must also fail. There is substantial evidence of a probative and reliable nature to support the Administrative Law Judge's finding that Appellant wrongfully failed to obtain or properly use information available to him from the radar to determine the course and speed of another vessel detected in his vicinity.

It is well established that if a vessel carries properly functioning radar equipment and she is approaching an area of known poor visibility, there is an affirmative duty to use that radar. Afran Transport Co. v. The Bergechief, 274 F. 2d 469, 476 (2d Cir. 1960). This raises a presumption that a reasonably prudent Master under the same circumstances would use radar. Appeal Decision No. 2027 (WALKER).

Appellant was in an area of poor visibility. He had knowledge of the presence of another vessel in the area. The radar on the VANTAGE HORIZON was in good working order and turned on. However, the Administrative Law Judge found that Appellant did not use this radar, or if he did, he did not properly use the information available to him. This having been established, it was for the Appellant to rebut the presumption of negligence. Appeal Decision No. 1793 (FARIA). The Judge was not persuaded by the defense expert's testimony, and thus the presumption of negligence was not rebutted. Appellant failed to show that he acted as a reasonably prudent Master under the same circumstances would have acted.

CONCLUSION

There is substantial evidence of a reliable and probative nature to support the finding of the Administrative Law Judge that Appellant was negligent for failing, during conditions of fog and restricted visibility, to obtain or properly use information available to him from radar observations to determine the course and speed of another vessel detected in his vicinity.

ORDER

The order of the Administrative Law Judge dated at Norfolk, Virginia on 12 March 1976, admonishing Appellant, is AFFIRMED.

E. L. PERRY
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 24th day of Nov. 1976.

INDEX

Charges and Specification
Amendment to

Inferences
Reasonable

Navigation
Fog
Radar

Negligence
Failure to use radar in fog

Notice
Amendment to specification

Presumption
Of negligence, failure to use radar in fog

Radar
Failure to use
Fog, use in